

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ACCENTURE GLOBAL SERVICES GmbH,)
Herrenacker 15, CH-8200 Schaffhausen,)
Switzerland and Accenture LLP, 161 North)
Clark Street, Chicago, Illinois)

Plaintiffs,)

v.)

Civil Case No. 09-715(RJL)

HON. DAVID J. KAPPOS)
Under Secretary Of Commerce)
For Intellectual Property and Director)
Of The United States Patent and Trademark)
Office. Office Of General Counsel,)
United States Patent and Trademark Office,)
P.O. Box 15667,)
Arlington, VA 22215 and)
Madison Bld. East, Rm 10B20,)
600 Dulany Street,)
Alexandria, VA 22314.)

Defendant.)

FIRST AMENDED COMPLAINT

Plaintiffs Accenture Global Services GmbH and Accenture LLP, for their complaint
against the Honorable David J. Kappos, state as follows:

NATURE OF THE ACTION

1. This is an action by the owners of United States Patent Nos. 7,440,906 (the '906 patent); 7,457,762 (the '762 patent); 7,457,763 (the '763 patent); 7,461,008 (the '008 patent); 7,469,219 (the '219 patent); 7,502,744 (the '744 patent); 7,552,205 (the '205 patent); 7,565,273 (the '273 patent); 7,587,331 (the '331 patent); 7,551,925 (the '925 patent);

7,574,387 (the '387 patent); 7,536,697 (the '697 patent); 7,599,502 (the '502 patent); and 7,599,520 (the '520 patent); seeking a review and correction of erroneous patent term adjustment calculations and an associated inadequate patent term adjustment award made by the United States Patent and Trademark Office (USPTO) while under the direction of the Honorable David J. Kappos, his predecessor the Honorable John J. Doll, or his predecessor, the Honorable John W. Dudas. The original Complaint and this First Amended Complaint are filed within 180 days following the grant of each of the associated patents introduced for the first time therein and are therefore timely filed pursuant to 35 U.S.C. § 154(b)(4)(A).

2. Plaintiff Accenture Global Services GmbH is the assignee and record owner of the aforementioned '906, '762, '763, '008, '219, '205, '273, '331, '925, '387, '697, '502, and '520, patents. Plaintiff Accenture LLP is the assignee and record owner of the aforementioned '744 patent. The plaintiffs are the real parties in interest in this case.

3. Pursuant to 35 U.S.C. § 154(b)(4)(A), plaintiffs seek a judgment that the patent term adjustments for the above-noted patents be increased as follows: the '906 patent term increased from 745 days to 1332 days (a 587 day increment); the '762 patent term increased from 1070 days to 1740 days (a 670 day increment); the '763 patent term increased from 1032 to 1420 (a 388 day increment); the '008 patent term increased from 921 to 1188 days (a 267 day increment); the '219 patent term increased from 474 days to 689 days (a 215 day increment); the '744 patent term increased from 926 days to 1239 days (a 313 day increment); the '205 patent term increased from 470 days to 768 days (a 298 day increment); the '273 patent term increased from 682 days to 753 days (a 71 day increment); the '331 patent term increased from 1111 days to 1746 days (a 635 day increment); the '925 patent term increased from 605 days to 797 days (a 192 day increment); the '387 patent term

increased from 847 days to 1037 days (a 190 day increment); the '697 patent term increased from 1654 days to 2182 days (a 528 day increment); the '502 patent term increased from 1180 days to 1848 days (a 668 day increment); and the '520 patent term increased from 671 days to 992 days (a 321 day increment).

4. This action arises under 35 U.S.C. § 154 and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

THE PARTIES

5. Plaintiff, Accenture Global Services GmbH is a limited liability company duly organized under and pursuant to the laws of Switzerland as a judicial person, and has a principal place of business at Herrenacker 15, CH-8200 Schaffhausen, Switzerland.

6. Plaintiff, Accenture LLP is a limited liability partnership organized and existing under the laws of the State of Illinois, and has a principal place of business at 161 North Clark Street, Chicago, Illinois.

7. Defendant, David J. Kappos is Under Secretary of Commerce for Intellectual Property and Director of the USPTO, acting in his official capacity and sued herein in that capacity. This named Defendant is the head of the USPTO and is responsible for supervising all activities required by law for granting and issuing patents and he is designated by statute as the official responsible for determining the period of patent term adjustments under 35 U.S.C. § 154.

JURISDICTION AND VENUE

8. This court has jurisdiction over this action and is authorized to issue the relief sought herein, pursuant to 28 U.S.C. §§ 1331, 1338(a) and 1361; 35 U.S.C. § 154(b)(4)(A) and 5 U.S.C. §§ 701-706.

9. Venue is proper in this district pursuant to 35 U.S.C. § 154(b)(4)(A).

10. This First Amended Complaint is timely filed in accordance with 35 U.S.C. § 154(b)(4)(A), Fed. R. Civ. P. 15(a)(1)(A) and a Minute Order of the Honorable Judge Richard J. Leone entered in this case on October 20, 2009.

CIRCUMSTANCES APPLICABLE TO ALL COUNTS

11. Section 154 of 35 U.S.C. requires the Director of the USPTO to grant a patent term adjustment in accordance with the provisions of § 154(b). Specifically, 35 U.S.C. § 154(b)(3)(D) states the Director “shall proceed to grant the patent after completion of the Director’s determination of a patent term adjustment under the procedures established under this subsection.”

12. All the above-listed patents were duly issued after prosecution and were given a patent term adjustment by the Director of the USPTO which, subject to any terminal disclaimers, would increase the term for each patent based on prosecution delays of the USPTO that exceed prosecution delays attributed to the applicant for the patent. Patents identified herein have no terminal disclaimers unless otherwise noted.

13. The Director calculates a patent term adjustment by taking into account delays of the USPTO under 35 U.S.C. § 154(b)(1), any overlapping periods in the USPTO delays under 35 U.S.C. § 154(b)(2)(A), and any delays of applicant under 35 U.S.C. § 154(b)(2)(C).

14. The primary dispute concerns how to calculate a total patent term adjustment in each case where the USPTO has delayed in the manner defined in 35 U.S.C.

§ 154(b)(1)(A) (“Type A delay”) and also has delayed under 35 U.S.C. § 154(b)(1)(B) by issuing a patent more than 3 years after the filing date of the associated patent application (“Type B delay”).

15. Except for U.S. Patent Nos. 7,574,387, 7,536,697 and 7,457,763, there is no dispute regarding the amount of either the Type A or Type B delays computed by the USPTO for the listed patents.

16. In computing the total patent term adjustment, the practice of the USPTO is to treat the Type A delay as overlapping with the Type B delay even when these delays do not occur on the same days. The Patent and Trademark Office therefore grants a total patent term adjustment for such delays in the amount of only the larger of the Type A or Type B delay.

17. Plaintiffs contend the correct total patent term adjustment should be the sum of the Type A and Type B delays to the extent they do not occur on the same days. This term adjustment calculation has been approved by this Court in *Wyeth v. Dudas*, Civil Action No. 07-1492(JR) , 580 F.Supp.2d 138 (D.D.C. Sept. 30, 2008); now on appeal to the Court of Appeals for the Federal Circuit.

18. This Court in *Wyeth* granted summary judgment against the USPTO, holding the USPTO’s above-noted methodology for calculating a patent term adjustment for Type A and Type B delays is erroneous as a matter of law and inconsistent with the Patent Statute. The *Wyeth v. Dudas* decision is attached as Exhibit 1.

19. The calculation methodology for the Type A/Type B patent term adjustment approved in the *Wyeth v. Dudas* decision is applicable for calculating the previously noted increased patent terms for all the aforementioned patents. The reduced term adjustments provided by the USPTO are arbitrary, capricious, constitute an abuse of discretion and are not in accordance with law. The USPTO's method of calculation is also in excess of statutory jurisdiction, authority, or limitations.

COUNT I: U.S. PATENT NO. 7,440,906

20. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

21. The '906 patent (attached as Exhibit 2) issued on October 21, 2008 from patent application SN 09/946,095 which was filed September 4, 2001. A patent term adjustment of 745 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

22. The owner of the '906 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 3) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 587 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 3. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT II: U.S. PATENT NO. 7,461,008

23. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

24. The '008 patent (attached as Exhibit 4) issued on December 2, 2008 from patent application SN 09/947,136 which was filed September 4, 2001. A patent term adjustment of 921 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

25. The owner of the '008 patent, Accenture Global Services GmbH, filed a petition (attached as Exhibit 5) with the USPTO to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 267 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 5. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT III: U.S. PATENT NO. 7,457,763

26. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

27. The '763 patent (attached as Exhibit 6) issued on November 25, 2008 from patent application SN 09/947,157 which was filed September 4, 2001. A patent term adjustment of 1032 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

28. The owner of the '763 patent, Accenture Global Services GmbH, filed a petition and a notice of correction (attached as Exhibit 7) with the USPTO to request reconsideration of the patent term adjustment determination of the Director. This petition and notice of correction are consistent with the holding in the *Wyeth v. Dudas* decision and seek to correct an error in computing the Type B delay and treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 388 extra days. The detailed analysis for this calculation is shown in the petition and notice of correction attached hereto as Exhibit 7. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT IV: U.S. PATENT NO. 7,457,762

29. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

30. The '762 patent (attached as Exhibit 8) issued on November 25, 2008 from patent application SN 09/946,032 which was filed September 4, 2001. A patent term adjustment of 1070 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

31. The owner of the '762 patent, Accenture Global Services GmbH, filed a petition (attached as Exhibit 9) with the USPTO to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 670 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 9.

This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition was denied by the USPTO on July 7, 2009.

COUNT V: U.S. PATENT NO. 7,502,744

32. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

33. The '744 patent (attached as Exhibit 10) issued on March 10, 2009 from patent application SN 09/947,024 which was filed September 4, 2001 and which was a continuation-in-part of application SN 09/690,793, filed October 17, 2000, now Patent No. 6,980,959. A patent term adjustment of 926 days was awarded for the '744 patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

34. The owner of the '744 patent, Accenture LLP, filed a petition (attached as Exhibit 11) with the USPTO to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 313 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 11. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT VI: U.S. PATENT NO. 7,469,219

35. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

36. The '219 patent (attached as Exhibit 12) issued on December 23, 2008 from patent application SN 10/879,368 which was filed June 28, 2004. A patent term adjustment of 474 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

37. The owner of the '219 patent, Accenture Global Services GmbH, filed a petition (attached as Exhibit 13) with the USPTO to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 215 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 13. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition was denied by the USPTO on May 1, 2009.

COUNT VII: U.S. PATENT NO. 7,552,205

38. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

39. The '205 patent (attached as Exhibit 14) issued on June 23, 2009 from patent application SN 10/152,890 which was filed May 21, 2002. A patent term adjustment of 470 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

40. The owner of the '205 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 15) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in

the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 298 extra days.

The detailed analysis for this calculation is shown in the petition attached hereto as

Exhibit 15. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d).

This petition is still pending in the USPTO.

COUNT VIII: U.S. PATENT NO. 7,565,273

41. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

42. The '273 patent (attached as Exhibit 16) issued on July 21, 2009 from patent application SN 10/766,738 which was filed January 27, 2004. A patent term adjustment of 682 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

43. The owner of the '273 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 17) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 71 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 17. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT IX: U.S. PATENT NO. 7,587,331

44. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

45. The '331 patent (attached as Exhibit 18) issued on September 8, 2009 from patent application SN 10/615,157 which was filed July 7, 2003. A patent term adjustment of 1111 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

46. The owner of the '331 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 19) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 635 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 19. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT X: U.S. PATENT NO. 7,551,925

47. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

48. The '925 patent (attached as Exhibit 20) issued on June 23, 2009 from patent application SN 11/313,496 which was filed December 13, 2005. A patent term adjustment of 605 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

49. The owner of the '925 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 21) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 192 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 21. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition was denied by the USPTO on September 22, 2009.

COUNT XI: U.S. PATENT NO. 7,574,387

50. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

51. The '387 patent (attached as Exhibit 22) issued on August 11, 2009 from patent application SN 10/793,016 which was filed March 4, 2004. A patent term adjustment of 847 days was awarded for this patent based on the USPTO's error in computing the Type A delay and erroneous method of treating Type A and Type B delays as overlapping.

52. The owner of the '387 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 23) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to correct an error in the computation of the Type A delay and treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 190 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 23. This petition was

timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT XII: U.S. PATENT NO. 7,536,697

53. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

54. The '697 patent (attached as Exhibit 24) issued on May 19, 2009 from patent application SN 09/927,957 which was filed August 9, 2001 and which claims priority to a provisional application No. 60/299,575, filed June 19, 2001. A patent term adjustment of 1654 days was awarded for this patent based on errors in computing Type A and Type B delays and an error in computing the sum of these delays.

55. The owner of the '697 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 25) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 528 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 25. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT XIII: U.S. PATENT NO. 7,599,502

56. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

57. The '502 patent (attached as Exhibit 26) issued on October 6, 2009 from patent application SN 10/614,764 which was filed July 7, 2003. A patent term adjustment of 1180 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

58. The owner of the '502 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 27) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 668 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 27. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

COUNT XIV: U.S. PATENT NO. 7,599,520

59. Plaintiffs incorporate by reference the allegations of paragraphs 1-19 above as if fully set forth herein.

60. The '520 patent (attached as Exhibit 28) issued on October 6, 2009 from patent application SN 11/282,349 which was filed November 18, 2005. A patent term adjustment of 671 days was awarded for this patent based on the USPTO's erroneous method of treating Type A and Type B delays as overlapping.

61. The owner of the '520 patent, Accenture Global Services GmbH, filed a petition with the USPTO (attached as Exhibit 29) to request reconsideration of the patent term adjustment determination of the Director. This petition is consistent with the holding in

the *Wyeth v. Dudas* decision and seeks to treat Type A and Type B delays as not overlapping; thereby increasing the USPTO's calculation of a patent term adjustment by 321 extra days. The detailed analysis for this calculation is shown in the petition attached hereto as Exhibit 29. This petition was timely filed with the USPTO pursuant to 37 CFR § 1.705(d). This petition is still pending in the USPTO.

WHEREFORE, Plaintiffs respectfully pray that this Court:

62. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '906 patent from 745 to 1332 days.

63. Issue an Order requiring the Director and the USPTO to change the patent term adjustment of the '762 patent from 1070 to 1740 days.

64. Issue an Order requiring the Director and the USPTO to change the patent term adjustment of the '763 patent from 1032 to 1420 days.

65. Issue an Order requiring the Director and the USPTO to change the patent term adjustment of the '008 patent from 921 to 1188 days.

66. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '219 patent from 474 to 689 days.

67. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '744 patent from 926 to 1239 days.

68. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '205 patent from 470 to 768 days.

69. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '273 patent from 682 to 753 days.

70. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '331 patent from 1111 to 1746 days.

71. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '925 patent from 605 to 797 days.

72. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '387 patent from 847 to 1037 days.

73. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '697 patent from 1654 to 2182 days.

74. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '502 patent from 1180 to 1848 days.

75. Issue an Order requiring the Director and USPTO to change the patent term adjustment of the '520 patent from 671 to 992 days.

76. Grant such other and further relief as the nature of this case may admit or require and as may be just and equitable.

Dated: October 28, 2009

Respectfully submitted,

s/s Joel W. Benson

Joel W. Benson

D.C. Bar No. 249078

BRINKS HOFER GILSON & LIONE

NBC Tower – Suite 3600

455 North Cityfront Plaza Drive

Chicago, Illinois 60611

Telephone: (312) 321-4200

Facsimile: (312) 321-4299

jbenson@usebrinks.com

Attorneys for Plaintiffs, Accenture Global
Services GmbH and Accenture LLP